

The Academy of Experts

FACT SHEET

Experts' Conferences in Hong Kong

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www.academyofexperts.org

This Fact Sheet is based on the position in Hong Kong for all Civil cases. Appropriate adjustments may need to be made for other courts or jurisdictions, for example in England & Wales there are similar provisions under the Civil Procedure Rules (CPR).

The document drawn up at the conclusion of the meeting is generally referred to as the 'Joint Statement' or 'Joint Report'. These terms are often used interchangeably as they refer to the same document. In order to reduce possible confusion with the Expert's Report the phrase 'Joint Statement' is used in this document.

What are Experts' Conferences

- ❑ The terms 'Meeting(s) of Experts', 'Discussion(s) of Experts' and 'Conference(s) of Experts' as well as others, are used in different jurisdictions and often in the same jurisdiction. Frequently they are used interchangeably as in reality they are essentially the same process. In this Fact Sheet they are referred to as 'Meetings'.
- ❑ In essence there are two types of Meetings – 'Court, Arbitrator or Tribunal Ordered' and 'Party Arranged'. They are very similar but there are some practical differences in their scope. They are not mutually exclusive and more than one type of Meeting can be used in the same case. For ease of reference they are dealt with separately.
- ❑ For ease of reference the most formal, 'Court Ordered', is dealt with fully, followed by the differences in 'Arbitrator and Tribunal Ordered' followed by 'Party Arranged'.

Court Ordered

- ❑ The procedure is laid down in the Court Rules – Code of Conduct for Expert Witnesses, Rules of the High Court, HK CAP 4A Evidence Order 38 rule 38 and in CAP 4A Appendix D. These stipulate such matters as the status of the Meeting ('Without Prejudice'); who can attend; matters to be discussed; action to be taken (eg Joint Statement or Joint Report) and the timetable.

Purpose

- ❑ *An Expert Witness shall abide by any directions of the Court [Ref Appendix D – 12 Expert's conference] to:*
 - a) *Confer with other expert witnesses;*
 - b) *Endeavour to reach agreement on material matters for expert opinion.*
 - c) *provide the Court with a Joint Statement specifying matters agreed and matters not agreed and the reasons for any non-agreement.*

- ❑ The equivalent practice in the UK is as follows (see Civil Justice Council Guidance for the Instruction of Experts):
- ❑ The purpose of discussions between experts should, wherever possible, be to
 - a. Identify and discuss the expert issues in the proceedings;
 - b. Reach agreed opinions on those issues, and if that is not possible, narrow the issues;
 - c. Identify those issues on which they agree and disagree and summarise their reasons for disagreement or any issue; and
 - d. Identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.
- ❑ They are not to seek to settle the proceedings. The role of the Expert does not include being a negotiator or a mediator.

When the Meeting should be held

- ❑ The Court will often stipulate when the Meeting has to be held or the date by which the Joint Statement is to be submitted. The Court can order a Meeting at any time. They can be at preliminary or early stages for example to enable the Experts to decide what tests need to be undertaken and for them to be arranged jointly with the attendant cost savings. It is the practice in some Courts that a Meeting be held prior to the preparation of Reports but the conventional timing for a Meeting is after the exchange of Reports when the Experts from both sides will be fully aware of the other side's Expert's opinions. In Hong Kong a common practice is for an exchange of Experts' Provisional Without Prejudice Reports to precede the Meeting which in turn will be followed by Open Reports. Each method has advantages and the choice of methodology will probably be determined by the nature of the case.
- ❑ Conventionally Reports are finalised and then 'exchanged', however it is possible for the Court to order that they are prepared and disclosed sequentially. Where this happens the timing of the Meetings and procedures may need to be varied. Meetings can be arranged whenever the Court or the parties decide it is appropriate.

Meeting or Meetings

- ❑ The nature and complexity of expert issues and what is at stake will be factors to be taken into account when deciding whether one or more Meetings should be held. Care must be taken to evaluate proportionality when reaching decisions about Meetings.

Prior to the Meeting

- ❑ Experts (and those instructing them) must ensure that they are familiar with the appropriate Rules in order that they may comply with them. There are variations in the procedures of different Courts, these will be stipulated in the applicable Rules or Court Orders. Failure to comply properly can be costly both financially and reputationally.
- ❑ An agenda for the Meeting of Experts should be agreed in advance of the Meeting and should usually be prepared by the parties' solicitors in co-operation with the Experts. The agenda should include any matter that the Court has ordered; any matter that one or more of the parties wish to be discussed including non hostile questions; any matters the Experts wish to discuss.
- ❑ Experts may not be instructed to avoid or defer reaching agreement on any matter within the Experts' competence.

The Meeting

Who should attend

- ❑ The Meeting is a meeting of the Experts and is intended for the appointed Experts only, it should not normally include assistants and others. The sub text is that it is for 'Experts of like discipline' as Meetings with mixed expertises can be counterproductive. Unless it is ordered by the Court, or agreed by all the parties and the Experts, neither the parties nor their legal representatives may attend the Experts' discussions. If legal representatives do attend they should not intervene in the discussion save to answer questions put to them by the Experts or to advise on the law. However, where lawyers have permission to attend the Meeting the Experts may, if they wish, conduct part of their Meeting in private without anybody else being present.

Form of Meeting

- ❑ The Meeting may be 'live', that is a physical meeting of the Experts. However, it does not have to be. The agenda and nature of the Meeting, the location of the Experts and the amount at stake all need to be considered as 'Meetings' can take place in any appropriate format, for example, video link, over the telephone or even by SMS. When deciding on the format, care should be taken to consider whether a physical meeting might produce better results and also the attendant difficulties of recording agreements when Experts are not together. Proportionality is not solely about minimising expenditure, it must also take into consideration other factors including the likelihood of the Meeting being productive if the Experts are not in the same room.

Status of the Meeting

- ❑ The Meeting and all discussions that take place are on a 'Without Prejudice' basis. However, the Joint Statement is also 'Without Prejudice' until it is signed when it becomes an 'Open' document which will be seen by the Court. Experts should remember when drafting the Joint Statement that the trial Judge is likely to focus on the differences revealed by the Statement. Experts do not need the permission of those instructing them or their lawyers in order to sign the Joint Statement which is meant to be their professional opinion. Before signing the Joint Statement it should be read carefully to ensure that all matters on the agenda have been properly covered and that the Statement properly reflects their opinion.

At the Meeting

- ❑ The Experts should conduct themselves as professionals and discuss all matters in a professional context. Experts should not seek to advocate their party's case although they may advocate their own professional opinions. They should take care to cover all items on the agenda and wherever possible narrow the issues or at least to agree 'figures as figures'.

Conclusion of the Meeting

- ❑ At the conclusion of the Meeting a Joint Statement must be prepared for the Court. This should set out:
 - a. Issues that have been agreed and the basis of that agreement;
 - b. Issues that have not been agreed and the basis of the disagreement giving cogent reasons for any disagreement;
 - c. Any further issues that have arisen that were not included in the original agenda for discussion; and
 - d. A record of further action, if any, to be taken or recommended, including if appropriate a further discussion between Experts.
 - e. Any significant change in an Expert's opinion should be noted in the Joint Statement explaining the change of opinion and the reason for it.
- ❑ A common practice is for the Joint Statement to be prepared by one Expert after the Meeting has finished. It will then be sent to the other Expert(s) for correction and signing; in practical terms this simple process is not Best Practice and can take a considerable amount of time and attendant expense. It should be remembered that the Joint Statement is effectively the minutes of what was agreed at the Meeting and not what an Expert, party or lawyer thinks should have happened. Wherever possible the Experts should sign off items as they agree them. This process reduces the areas for subsequent disagreement about what was or was not agreed.

- ❑ The Joint Statement should be signed by the Experts at the conclusion of the Meeting or as soon as practicable afterwards.

Joint Statement Declaration

- ❑ Any Expert Report produced and served must contain a Statement of Truth in accordance with Order 41A, r, 2 of the Rules of the High Court, Appendix D – “7 Expert report to be verified”.
- ❑ In Hong Kong the Court requires for all expert report (including Joint Statements) to be verified by a statement of truth in accordance with the Order 41A of the Rules of the High Court as set out in Appendix D item 7:

Statement of Truth O41A, r.5

We believe the facts stated in this Joint Expert Report and true and the opinions expressed in it are honestly held.

- ❑ Although in Hong Kong it is not a requirement it is suggested that a Declaration is used in addition to the Statement of Truth. In England & Wales this is mandatory for all civil cases under CPR in accordance with the guidance issued by the Civil Justice Council.
- ❑ Generally, the discussion between Experts takes place after the Reports have been prepared and exchanged. These Reports would have included the Expert’s Declaration. If however, the discussion is before the preparation of the Experts’ Reports, a different Declaration is required on the Joint Statement.

The Declaration to be used when the Meeting is after Reports being exchanged

- 1. We the undersigned experts individually here re-state the Expert’s Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue so to do.*
- 2. We further confirm that we have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid or otherwise defer from reaching agreement on any matter within our competence.*

The Declaration to be used when the Meeting is prior to Reports being prepared

- 1. We the undersigned experts individually confirm that we understand our overriding duties to the court, have complied with them and will continue so to do.*
- 2. We the undersigned experts individually confirm that we have read the Code of Conduct for Expert Witnesses, Rules of the High Court Cap 4A, Appendix D and have complied with their requirements.*

3 *We further confirm that we have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid or otherwise defer from reaching agreement on any matter within our competence.*

NOTE: This declaration is for the Joint Statement only and does not take the place of the full Expert's Declaration which should be included in all Experts' Reports - see www.academyofexperts.org, Cap 4A O.28 r. 37C and Appendix D - 56 'Declaration of Duty to Court'.

CAUTION

Carefully read and check the Joint Statement before you sign it – it will be too late after your signature is appended.

Make certain that the Joint Statement reflects the discussion and any agreement reached.

Tribunal or Arbitrator Ordered Meetings

- ❑ When a Meeting is ordered by a Tribunal or Arbitrator the situation in essence is the same as a Court Ordered Meeting. However, while Court Ordered Meetings are governed by the Procedural Rules of the Court, these do not automatically apply to either Tribunals or Arbitration. Instead, those ordered by a Tribunal or Arbitrator will be governed by their own Rules which may not be identical although they are likely to be similar.
- ❑ Tribunals tend to have Procedural Rules and these will often be the same or similar to the Court Rules.
- ❑ Arbitrator Ordered Meetings will either be governed by the Rules of the Arbitration, for example HKIAC, LCIA or IBA, or by the Order of the Arbitrator. Although CPR gives a good indication of Best Practice, care must be taken to comply with the appropriate Rules. In particular, it is important to establish the status of the Meeting ie whether it is 'Open' or 'Without Prejudice' before the Meeting is held.

Party Arranged Meetings

- ❑ The essential difference between a Party Arranged and a Court or Tribunal/Arbitrator Ordered Meeting is control. Both of the latter types are referred to as 'Ordered Meetings' in this section.
- ❑ With Ordered Meetings most of the decisions are reached by the Court or Tribunal/Arbitrator and laid down in the Rules of the Court or other relevant Rules and/or Orders.
- ❑ In contrast, with Party Arranged Meetings, the procedure, timetable, content of the Meeting and its status (for example, whether it is 'without prejudice' or 'open') is for the parties to agree and stipulate. This includes matters to be or not to be discussed and who may attend.
- ❑ Although the provisions and process for Party Arranged Meetings can be identical to those for Ordered Meetings, there may be little or no similarity. The procedures for Ordered Meetings will serve as a useful guide and check list for use or modification in Party Arranged Meetings.
- ❑ Those deciding on a Party Arranged Meeting of Experts need to consider and decide matters of principle in advance of the Meeting. Importantly Experts need to know of the decisions in advance of the Meeting and their preparation for it. As examples, they need to know if they can disclose all documents including those which may be privileged; whether they are required to prepare and sign a Joint Statement and if so, what it should include.
- ❑ Party Arranged Meetings with their inbuilt flexibility can be of great value to all concerned but they need to be carefully planned and scheduled whilst having proper regard to proportionality.

CAUTION

If there is a Joint Statement or Joint Report you should read it carefully and check it before you sign it – it will be too late after your signature is appended. Make certain that it reflects the discussion and any agreement reached and that you understand the status of any such document before you sign it.

Academy Fact Sheets

TAE publishes technical guidance on a range of issues. These are generally in the form of Fact Sheets & Information Sheets - the Fact Sheets being more technical in nature and aimed at TAE members whilst Information Sheets provide guidance for those seeking further information about the work of an Expert or TAE itself.

The Fact Sheets listed below are primarily aimed at Academy members - they are available to TAE members from the TAE website www.academyofexperts.org.

Title	Sheet	Jurisdiction *
Comments on the "Guidance for the instruction of experts in civil claims" produced by the Civil Justice Council	2015-01	England & Wales
Guidance on the NI Practice Direction effective 1st January 2015	2015-02	Northern Ireland
Discussions between Experts	2015-03	
Privilege	2015-04	
Conflicts	2016-02	
Confidentiality	2017-01	
Expert's Conferences in Hong Kong	2017-02	Hong Kong

* Where no jurisdiction is shown the Fact Sheets apply universally.

FURTHER INFORMATION

The Academy of Experts

❑ www.academyofexperts.org

Resources and guidance for Experts and users of Experts
Dedicated Member area

Department of Justice (HK)

❑ www.doj.gov.hk

The Department of Justice plays a significant role in the HK legal system. The Department gives legal advice to other bureaux and departments of the Government, represents the Government in legal proceedings, drafts government bills, makes prosecution decisions, and promotes the rule of law.

Ministry of Justice (UK)

❑ www.justice.gov.uk

Website contains resources for legal professionals including Procedure Rules for Civil, Criminal & Family Cases

The Academy of Experts

The Academy

Located in Gray's Inn TAE was founded in 1987 with the objective of providing, for the first time, a professional body for experts to establish and promote high objective standards.

Although there is representation on the Academy's Council from the legal profession the majority of the officers, including the Chairman, are practising Experts - The Academy of Experts (TAE) is run by Experts for Experts and those using them.

Training and development

TAE offers a comprehensive range of training programmes to enable members to develop their expert skills, and undertake Continuous Professional Development activity. Courses range from basic Role and Responsibilities through to the requirements of Procedure Rules and the practice of Giving Evidence.

TAE is also a training and accreditation body for ADR Neutrals, including Mediators, Conciliators and Expert Determiners. It publishes and maintains The Register of Qualified Dispute Resolvers and awards the designatory letters QDR to those achieving the approved standard. Standards are enforced in exactly the same way as for experts.

Accreditation of experts

All applicants to TAE who wish to become Accredited Practising Expert Witnesses undergo a rigorous vetting procedure to ensure standards of excellence are maintained. This is the process which gives the officially recognised full accreditation as a Practising Expert. Those achieving it are awarded the designatory letters MAE. Ethical and professional standards are underlined by Codes of Practice and enforced by a disciplinary committee.

ADR

The promotion of Cost Efficient Dispute Resolution became increasingly important to TAE. It is now a major force in the introduction and development of Alternative Dispute Resolution (ADR) and has led to the development of the Faculty of Mediation and ADR.



Range of services

TAE provides a full range of services to its members including:

- Technical Helpline
- Bespoke Training
- Technical Meetings
- Magazine and regular newsletters
- A detailed Expert's Handbook for Practical Guidance
- A regular survey of expert's fees
- Regular meetings on matters of expert interest
- Social functions

TAE provides a number of services which assist both Academy members and the legal profession including:

- ExpertSearch** Finding and matching the right accredited expert to the case.
- Full training & accreditation of **Commercial Mediators** and **Expert Determiners**. The Academy awards the qualification QDR (Qualified Dispute Resolver) to members on its register.
- Mediator Appointment Service - Finding the right accredited mediator.
- Membership also open to lawyers.